Appendix A

United States Court of Appeals for the Ninth Circuit

No. 81-7499

In the Matter of JOHN KELLY,

Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, MARINE TERMINALS CORP., and INA/PACIFIC EMPLOYER'S INSURANCE GROUP,

Respondents.

ORDER FOR PUBLICATION

Before: BROWNING, Chief Judge, Swygert* and WRIGHT, Circuit Judges

The facts in this appeal from the decision of the Office of Workers Compensation Programs denying coverage are indistinguishable from those in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2d Cir. 1981). The *Arbeeny* claimants were covered because in protecting cargo from theft they were an integral part of the loading and unloading process. Kelly's job involved protecting shipping containers from theft damage. We reverse the Board's order for the reasons stated in *Arbeeny*.

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*Honorable Luther M. Swygert, Senior Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

Appendix B

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-670

JOHN KELLY
Claimant-Respondent

vs.

MARINE TERMINALS CORPORATION
and
INA/PACIFIC EMPLOYER'S INSURANCE GROUP
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION and ORDER

Appeal from the Decision and Order of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Kathryn E. Ringgold (Airola & Ringgold), San Francisco, California, for the claimant.

Albert Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for the employer/carrier.

Laurie M. Streeter, Associate Solicitor (T. Timothy Ryan, Jr., Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER AND KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by employer from the Decision and Order (79-LHCA-1488-S) of Administrative Law Judge Thomas Schneider pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Following a hearing, the administrative law judge below held that claimant was a maritime employee as defined in Section 2(3) of the Act, 33 U.S.C. § 902(3),[1] and awarded claimant benefits for permanent total disability. On appeal, claimant's employer, Marine Terminals Corporation, argues that claimant was not engaged in employment covered under Section 2(3) of the Act, and that claimant's disability was not caused, aggravated or precipitated by his injury at work. We conclude that claimant's employment does not fall within the coverage of the Act.[2] Therefore, we find it unnecessary to consider the other issue raised by employer.

Claimant worked for one and a half years as a waterfront security guard. His duties involved providing cargo security within terminal areas for various employers. He was injured on November 1, 1977, when he tripped and fell while making his rounds in employer's container storage yard.

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1. Section 2(3) provides, "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker...."

2. Contrary to the dissenting opinion of Judge Miller, it is well-settled that a claimant's status as an employee under Section 2(3) of the Act is a threshold issue which must be settled without the benefit of the Section 20(a) presumption. *Sedmak v. Perini North River Associates*, 9 BRBS 378, 382-383 (1978), *aff'd* 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980).

Claimant's duties in the instant case were similar to those of claimant in *Arbeeny v. McRoberts Protective Agency, Inc.*, 12 BRBS 435, BRB No. 79-371 (1980), *rev'd*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981). In *Arbeeny*, we concluded that the duties of waterfront security guards lack the nexus to maritime transportation which we have found when considering the duties of other employees who do not actually handle cargo, but who are nonetheless covered by the Act. *See Cabezas v. Oceanic Container Service, Inc.*, 11 BRBS 279, BRB No. 78-592 *et al.* (1979). We held in *Arbeeny* that a claimant whose duties involved guarding cargo while it was being loaded and unloaded is not a longshoreman or person engaged in longshoring operations within the meaning of Section 2(3) of the Act. *See also Conlon v. McRoberts Protective Agency, Inc.*, 12 BRBS 473, BRB No. 79-399 (1980) *rev'd sub nom. Arbeeny.*[3]

Guard duties alone lack the realistically significant relationship to navigation and commerce which would bring a claimant within the more general category of maritime employment. *Holcomb v. Robert W. Kirk & Associates, Inc.*, 11 BRBS 835, BRB No. 78-566 (1980). A claimant who performs guard duties on board a ship performs duties typical of the support services incidental to any business operation. *Holcomb, supra* at 839. Such duties are analogous to those of the claimant in *Dravo Corp. v. Banks*, 567 F.2d 593, 7

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3. In reversing our decisions in *Arbeeny* and *Conlon*, the Second Circuit found claimants covered on the basis that guard duties involve an integral part of the loading and unloading process. We cannot agree with the Second Circuit's analysis in *Arbeeny* and *Conlon*. Therefore, we adhere to our prior decision that security guards do not perform duties which involve longshore operations. *See Vaughn v. Lansdell Protective Agency*, ... BRBS ....., BRB Nos. 79-498/A (June 12, 1981).

BRBS 197 (3rd Cir. 1977), whose work lacked the requisite nexus to maritime employment.[4]

In the instant case, the administrative law judge found that claimant's work providing security for containers and chassis stored at the Marine Terminal in Oakland was as important to the containers' continued use in longshoring operations as their maintenance and repair. The Board has held employees engaged in the inspection, maintenance and repair of containers and cargo-handling equipment covered by the Act. *See Cabezas, supra; Yanes v. Sea Land Service, Inc.*, 6 BRBS 718, BRB No. 77-123 (1977); *Lewis v. Pittston Stevedoring Corp.*, 7 BRBS 691, BRB No. 77-352 (1978). We do not believe, however, that container security has the nexus to longshoring operations which we have found when examining the duties of persons maintaining and repairing containers and other longshoring equipment. Providing security for an employer's containers, like the security services performed in connection with the loading and unloading of cargo in *Arbeeny*, is not an integral part of longshoring operations. Therefore, whether providing protection for actual cargo or guarding empty or filled containers, a security guard is outside the scope of Section 2(3) of the Act.

Because we hold that claimant's duties did not constitute

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4. The administrative law judge in the instant case distinguished *Dravo Corp.* as well as our decision in *White v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 493, BRB Nos. 78-163/A (1978), *rev'd*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), on the basis that "longshoring operations" involve a broader category of employment than shipbuilding. We do not find that a valid distinction. While *White* and *Dravo Corp.* specifically involved shipbuilding, we note that the nexus to maritime employment is the same whether claimant is engaged in loading, unloading, building or repairing vessels or any other form of maritime activity.

maritime employment within the meaning of Section 2(3) of the Act, the Decision and Order of the administrative law judge is reversed.

SO ORDERED.

/s/ ISMENE M. KALARIS
Ismene M. Kalaris
Administrative Appeals Judge

I Concur:

/s/ SAMUEL J. SMITH
Samuel J. Smith, Chief
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, dissenting:

I must strongly dissent from my colleagues' holding that claimant is not covered by Section 2(3) of the Act. In this case, as in all others involving similar issues, the Board should begin with consideration of the presumption contained in Section 20(a) of the Act. 33 U.S.C. § 920(a). The majority declines to consider this section, which places the burden on employer to go forward with evidence supportive of a determination that claimant is outside the scope of the Act. *See* my dissenting opinion in *Brown v. Hydro-Dredge Corp.*, BRBS ....., BRB Nos. 79-721/A June 10, 1981).

However, the evidence in this case regarding claimant's employment as a security guard leads inevitably to the conclusion that claimant was engaged in employment covered by the Act. The facts reveal that claimant was employed on the waterfront as a security guard for a year and a half and was subject to assignment in any part of the terminal including on board ship during this time. Therefore, he is covered by the Act because he was subject to assignment on board a ship. *See* my dissent in *Arbeeny*. In addition,

as I stated in *Arbeeny* and *Vaughn*, I would hold that claimant's duties as a waterfront security guard involved an integral part of a longshoring operation.

This conclusion is also supported by the United States Court of Appeals for the Second Circuit's reversal of my colleagues' decision in *Arbeeny*. In *Arbeeny*, the Second Circuit noted that providing security against the loss of cargo "unquestionably serves a maritime purpose—the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation . . . ." 13 BRBS at 181, 342 F.2d at 675.

Claimant's duties in the instant case were essential to the movement of cargo in maritime transportation. It is irrelevant that he was guarding empty containers when injured. First, even if such work were not covered, the fact that a claimant is performing employment at the moment of injury which is not covered by the Act is not a valid ground for denying claimant coverage. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). Second, providing security to containers in order to protect them against vandalism is as important as protecting cargo while it is actually being loaded and unloaded. As the Supreme Court has noted, the Act was intended to incorporate technological advances in cargo handling. *See Caputo; P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). In a landmark case extending the unseaworthiness remedy to longshoremen, the Supreme Court noted as follows:

> Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. Florez v. The Scotia, D.C., 35 F. 916; The Gilbert Knapp, D.C., 37 F. 209, 210; The Seguranca, D.C., 58 F. 908, 909. That the owner seeks to have it done with the advantages of

> more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 96 (1946). Analogously, the work performed by this claimant was historically performed by a member of the ship's crew. The use of containers in longshoring operations represents a technical advancement over traditional methods of loading and unloading vessels. It is clear that a security guard who protects containers performs work which is the functional equivalent of guard work on board a ship or during the actual loading and unloading process. It makes no difference whether a security guard is hired to protect actual cargo or the ship's equipment such as containers.

In addition, the Board has held that persons who maintain and repair containers are engaged in longshoring operations. *See Cabezas; Yanes.* I would therefore affirm the administrative law judge's conclusion that cargo security is as important to a container's continued use in longshoring operations as its maintenance and repair.

I would also hold claimant covered under the Act as a harbor-worker. Claimant herein provided security services directed at maintaining a terminal on the waterfront. As I stated in my dissent in *Vaughn*, security guards who work in terminal areas and on board ships are involved in the maintenance of a harbor facility. *See Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365, BRB No. 76-451 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 11 BRBS 86, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 100 S.Ct. 2960.

Furthermore, I note that claimant would also be considered a "maritime employee" under the stringent view enunciated by the United States Court of Appeals for the Ninth Circuit, the circuit in which the instant claim arises, in *Weyerhaeuser Co. v. Gilmore*, 3 BRBS 140, 528 F.2d 957

(9th Cir. 1976), *cert. denied*, 429 U.S. 868 (1976). Announcing its definition of maritime employment as used in Section 2(3), the court stated that

> [t]he occupational hazards intended to be guarded against are the *traditional hazards to the ship's service employee arising in the course of his employment; i.e., the perils of the sea and an unseaworthy vessel recognized under maritime laws.* Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment.
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> We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment . . . must have a realistically significant relationship to '*traditional* maritime activity involving navigation and commerce on navigablewaters' . . . .

3 BRBS at 144, 528 F.2d at 961 [emphasis added]. As I stated in my dissent in *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 11 BRBS 835, 841, BRB No. 78-566 (1980), it is "difficult to imagine any form of maritime activity more traditional than the performed by the ship's watch." 11 BRBS at 842. Traditionally, this function was performed by a ship's officer or other member of a crew.

Claimant's work herein was the modern equivalent of that of a ship's watch. Technological changes have resulted in containers becoming a necessary part of a ship's appurtenances, as is illustrated by the following language from *Caputo.*

> unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time consuming work of stowage and unstowage to be performed on

> land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo onto the vessel. In effect, the operation of loading and unloading has been moved shoreward; *the container is a modern substitute for the hold of the vessel.*

6 BRBS at 163, 432 U.S. at 270 [emphasis added; footnote omitted]. Thus, changes in traditional ship's service employment wrought by containerization are undeniably within the scope of Section 2(3). Claimant's work guarding containers was therefore covered by the Act, since such duties have traditionally been held to be maritime in nature. *See* my dissent in *Holcomb*.

For the foregoing reasons, claimant was clearly engaged in employment covered by the Act. My colleagues' holding that he is not entitled to benefits because he was excluded from jurisdiction once again ignores the rule that the Act is to be construed liberally in conformance with its beneficient purposes. I dissent.

/s/ JULIUS MILLER

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Julius Miller
Administrative Appeals Judge

Dated this 19th day of June 1981

Appendix C

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office
Suite 600 — 211 Main Street
San Francisco, California 94105

CASE NO. 79-LHCA-1488-S
OWCP NO. 13-51896

In the Matter of
JOHN KELLY
Claimant

VS.

MARINE TERMINALS CORPORATION
Employer

INA/PACIFIC EMPLOYERS INSURANCE GROUP
Carrier

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For the Employer
and Carrier

Before: THOMAS SCHNEIDER
Administrative Law Judge

DECISION AND ORDER

John Kelly claims benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, (the "act"). All code section references are to 33 U.S.C. unless otherwise noted.

The principal issues are: (1) coverage (2) causal relationship between injury and disability.

A hearing was held on July 23, 1979, in San Francisco, California. The employer and the carrier (hereinafter jointly "respondents") and claimant all appeared represented by counsel.

Findings of Fact Conclusions of Law

The parties stipulated and I find that: claiminant's average weekly wage on November 1, 1977, was $272.86; he was born on December 20, 1926; he was employed by the employer as a security officer on November 1, 1977; on that date he sustained an injury in the course of his employment; and he filed a claim under the Act on June 14, 1978.

Background

Claimant had been a security guard at the waterfront for about one-and-a-half years, working for different employers. November 1, 1977, was the second night he worked for this employer at the Marine Terminal in Oakland. The first night he worked at the gate to the Terminal. The second night he was a rover, driving around the container storage area, dismounting at each of eleven key stations to punch a clock. At station No. 7 he did not know where the clock was located. It was very dark. He struck his foot against a concrete box which housed electrical outlets for refrigerated containers. As a result he stumbled and fell, striking his right shin, his left knee and right shoulder. He also testified he struck his head against a pole, and

lost his hard hat. He filled out an accident report, and kept working that night, and continually for one week. On November 8, 1977, he saw a surgeon at Kaiser Hospital, who simply treated the healing abrasion on claimant's leg. He testified he had complaints in his shoulder and head and numbness in his right leg. He worked at various places. On December 6, 1977, he was seen by a Dr. Benner at Kaiser who referred him to orthopedics. On December 13, 1977, he was seen in orthopedics and placed on disability. He has not worked since. He suffers from a neurological deficit more fully described below.

Coverage

The threshold question is whether claimant was "engaged in maritime employment" as that term is used in § 902(3).[1]

Claimant was a security guard. On the night of the injury he was assigned to drive around that portion of the terminal where containers are stored and to punch in at various key clock stations that record his presence. His function was to prevent theft and fire, report on downed fences or unauthorized persons, read the temperatures on refrigerated containers to insure that they are constant, etc. At the time of the accident the containers and chassis in the yard were empty. But it appears that the containers were being used in maritime commerce (Tr.. 200-201).

Whether such security guard work is "maritime" depends on whether it is "more oriented" to the sea than to the land. *Cargill, Inc. v. Powell*, 573 F.2d 561, 564, 7 BRBS 1

1. § 902. Definitions

When used in this chapter— . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(9th Cir. 1977); see, *Sea-Land Service v. Director, OWCP*, 540 F.2d 629, 631, 4 BRBS 289 (3rd Cir. 1976). In order to find coverage under the Act, the courts and the Benefits Review Board have also sometimes required a "close functional nexus" between a claimant's job and one of the categories enumerated in § 902(3), *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3rd Cir. 1977) or the job to be "essential or integral" to one of the enumerated categories. *White v. Newport News Shipbuilding and Dry Dock Co.*, 9 BRBS 493, 496 (BRB 1978). We are not here concerned with the much mooted question whether employees not concerned with cargo handling operations may be covered by the Act. See, e.g., *Fusco v. Perini North River Associates*, 601 F.2. 659, 10 BRBS 624 (2nd Cir. 1979) reversing *Sedmak v. Perini North River Associates*, 9 RBBS 378 (BRB 1978).

Counsel have not cited and I have not found any coverage case involving a watchman or a security guard. However, the following cases are instructive.

Yanes v. Sea-Land Service, Inc., 6 BRBS 718 (BRB 1977) held covered a person employed to inspect and repair containers that had been off-loaded and were to be reloaded aboard vessels and chassis that were used to transport containers in the terminal and outside. Factually, the only distinction between that case and the instant case is that Yanes inspected and repaired containers while Kelly guarded them.

Dellisanti v. Atlantic Container Lines, Ltd., 5 BRBS 340 (BRB 1977) held covered by the act a person checking automobiles that had been unloaded from ships and stored in a field 1,000 feet from the water's edge. The cars would be kept on the field and sorted out prior to their being delivered to consigness.

Sea-Land Service v. Director, OWCP, supra, 540 F.2d 629, involved a truck driver driving a crate of cargo on a public street between two dock facilities. On the record before it the court could not determine whether the driver was an over-the-road driver, delivering his load to a consignee, or whether he was carrying it to a temporary storage area. If he was delivering the load to a consignee, the court said, he would be land oriented; if he was carrying it to temporary storage he would be engaged in maritime employment. In the instant case the containers claimant was guarding were, at least in large part, being temporarily stored for further use on ships.

The court in *Texports Stevedoring Co. v. Winchester,* 554 F.2d 245, 6 BRBS 265 (5th Cir. 1977), modified, 561 F.2d 1213, reh. en banc granted, 569 F.2d 428 (5th Cir. 1978) held covered a gear man, who maintained, supplied and repaired gear used in loading and unloading ships. *Lewis v. Pittston Stevedoring Corp.,* 7 BRBS 691 (BRB 1978) is to the same effect.

Carroll v. Hullinghorst Industries, Inc., 7 BRBS 538 (BRB 1978) held covered a carpenter, who was building a scaffold upon which other workers could stand to repair a cargo-handling device. The Board said he "was 'directly involved' in shiploading operations." 7 BRBS at 544. Mechanics who repair equipment used in loading and unloading ships have uniformly been held to be engaged in maritime employment. *Michaelson v. H. W. Ramberg & Co., Inc.,* 7 BRBS 886 (BRB 1978) and cases cited therein, and *Sargent v. Matson Terminals, Inc.,* 8 BRBS 564, 566 (BRB 1978) and cases there cited.

All the foregoing cases suggest that claimant has the required status, since containers are clearly an integral part of loading and unloading operations, and their security is as important as their maintenance or their repair.

Two cases have denied coverage on the theory that the work performed by the claimant is "typical of the support services performed in any production entity, maritime or not." *White v. Newport News Shipbuilding and Dry Dock Co., supra,* 9 BRBS 493, 496, and *Dravo Corp. v. Banks, supra,* 567 F.2d 593, 595-596. Both cases involved workers in the shipbuilding industry. White received and stored pipe which eventually would become part of a vessel. The Board held that task to be preliminary and not an intergal part of ship construction. 9 BRBS at 497. Banks was a laborer who spread salt on icy walkways in the shipyard. The court said, "Clearing ice is a necessary 'incident' of *any* operation. We suggest that in order to be covered, Banks' job should have been a necessary 'ingredient' in the shipbuilding process, which it was not." 7 BRBS at 200-201.

I find it difficult to reconcile these two cases (*White* and *Dravo Corp.*) with the other cases cited above. If they are irreconcilable, I would follow the weight of authority. But for purposes of coverage a distinction between the cargo handling industry and the shipbuilding industry may be founded on the words of the Act. Section 902(3) provides that "the term employee means any person engaged in maritime employment, including any longshoreman *or other person engaged in longshoring operations,*" and a "shipbuilder," but it does *not* expressly include any *other person engaged in shipbuilding operations.* This may be the reason for denying coverage to persons who are engaged in shipbuilding operations, but not very directly engaged in shipbuilding, while granting coverage to those not directly engaged in longshoring, i.e., loading or unloading ships, but engaged in longshoring operations, which include most activities that go on in a marine terminal. This view,

respecting longshoring operations, if not shipbuilders, finds implicit support in OWCP's "LHWCA Program Memorandum No. 58," reproduced as Appendix AA in Millus & Manes, *The Longshoremen's and Harbor Workers' Compensation Act and Its Extensions,* (1978). The pertinent language reads as follows:

> Even if the injured worker was not employed in the occupation of longshoreman when injured, he or she is an "employee" within the Act if "engaged in longshoring operations." Such operations include two subcategories: stevedoring operations (the immediate loading and unloading of vessels) and terminal operations (the other cargo-handling activities associated with stevedoring operations). . . . Longshoring operations may be regarded as all operations necessary to the transfer of cargo between land and water modes of transportation which are performed by workers associated with that transfer rather than with the transportation itself. The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had "employee" status under § 2(3).
>
> Within [sic] a few exceptions, such as purely clerical employees whose duties do not pertain directly to particular cargo, all employees within the waterfront cargo-handling industry should be regarded as "employees" within the Act.
>
> Millus & Manes, op. cit., pp. 371-372.

The instant case arises in the cargo handling industry. Claimant Kelly was working on an obviously covered situs, doing work that I conclude is more oriented to the maritime mode of transportation than to other modes. I therefore conclude that claimant is engaged in maritime employment under § 902(3).

Walter Tantzen, Inc., v. Shaughnessy, 601 F.2d 670, 10 BRBS 710 (2nd Cir. 1979), to the extent it is binding in the Ninth Circuit (an issue I do not decide), requires the administrative law judge to decide whether the employer has any employees who work on "actual water," as opposed to navigable waters defined in § 902(4) and § 903(a) to include adjoining piers, etc. If it has no such employees, the court holds, it is not an "employer" under § 902(4), and claimant would not be covered. I am taking official notice of what I believe to be a fact, that the employer, Marine Terminals Corporation, does have employees on "actual water." If respondents have evidence that proves otherwise, they should so indicate in a timely petition for reconsideration. 20 C.R.F. § 802.205A. Such a petition should also address the authoritativeness of the *Walter Tantzen* decision.

Accordingly, I conclude that claimant was covered by the Act at the time of his injury.

Casual relationship between injury and disability

Two neurologists testified at the hearing. One, Dr. Anderson was claimant's treating physician. His diagnosis is that claimant suffers from a cervical myelopathy, traumatically induced by the injury of November 1, 1977. The second, Dr. Fortuin, an associate clinical professor of neurology at the University of California Medical School, examined claimant at respondents' request. His diagnosis is multiple sclerosis. In a report dated November 28, 1978, he opined that the multiple sclerosis was aggravated and precipitated by the injury of November 1, 1977. At the hearing, however, Dr. Fortuin changed his opinion; his diagnosis was still multiple sclerosis, but he now believed that the injury of November 1, 1977, did not aggravate or precipitate the disease. The reasons for changing his opinion on this crucial question were that (1) after viewing photographs

of the terminal area where the injury occurred, (Emp. Ex. F) he was convinced that the November 1, injury was "trivial" and insufficient to precipitate multiple sclerosis; and (2) he had erroneously believed that claimant's neurologic symptoms manifested themselves within a week of the injury, but on review of the records discovered that six weeks elapsed between the injury and first neurologic verification of symptoms.

Although I found Dr. Fortuin an articulate and generally convincing witness, and although I value his courage in admitting prior mistakes, I cannot adopt as true the factual premises necessary to support his change of opinion. The photographs (Emp. Ex. F-1, 2, 3, 4 & 6) show that the concrete box over which claimant allegedly tripped was about 15 feet away from the pole against which he allegedly struck his head. Although it may be unusual to stumble for such a distance and have enough momentum left to strike the head with force, it is not impossible. Claimant weighed over 200 pounds, which gave him considerable inertia. His immediate written report states that he hurt his left knee, right shin and right shoulder (Emp. Ex. E). Injury to the shoulder is not inconsistent with injury to the neck. More importantly, I have no reason to disbelieve that claimant's neurological symptoms appeared within two weeks of the injury. Dr. Fortuin was persuaded by the fact that claimant was not seen by a neurologist until December 22, 1977, and that the first physician that noted claimant's foot "turned outward" was Dr. Benner on December 6, 1977. But Dr. Benner notes that claimant "for last three weeks had onset of rubbery sensation of R knee" (Emp. Ex. A, p. 11). Dr. Fortuin also testified that if claimant's disease had been aggravated by trauma, he would expect some immediate symptoms that would improve with

time, even though in the long run multiple sclerosis would be degenerative. One such symptom was noted by Dr. Anderson in claimant's right upper extremity (Emp. Ex. A, p. 20).

Accordingly, I find the opinion consistently expressed by Dr. Anderson and by Dr. Fortuin in his report of November 28, 1978 (Cl. Ex. 16), to wit, that claimant's condition was caused or aggravated or precipitated by the injury of November 1, 1977, more convincing than Dr. Fortuin's later view. I find claimant permanently and totally disabled by the injury of November 1, 1977.

I need not, indeed could not, decide whether claimant's disability stems from cervical myelopathy or from multiple sclerosis. It suffices for a finding of permanent and total disability that claimant cannot return to the job of security guard and that respondents have not shown that claimant has job opportunities available to him. *Dantes v. Western Foundation Corporation Association*, 10 BRBS 541, 545-549 (BRB 1979) distinguishing and declining to follow *Air America, Inc. v. Director, OWCP (Kerch)*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). Even under the rule of *Kerch* I would find permanent and total disability. Claimant's employment history suggests that despite seemingly strong paper credentials he has been unable to get work except as a security guard.

Medical Treatment

There is considerable evidence that claimant periodically suffers from severe depression, and that his medical condition, resulting from the November 1, 1977, injury, has contributed to such depression. It may be that psychotherapy will be helpful to claimant. Accordingly, respondents should furnish psychotherapy as well as other medical care as necessary to relieve the effects of the injury. They should also pay outstanding medical bills of

$387.90 (Cl. Ex. 4 and enclosure to Ms. Ringgold's letter of July 30, 1979).

Penalty and Interest

Penalty and interest is an issue in every case. *Sleigh v. Pittsburgh and Conneaut Dock Company,* 8 BRBS 342, 351 (BRB 1978). Notice of controversion was never filed. Therefore, the penalty provided by § 914(e) is mandatory. *Id.*

Six percent interest on installments not paid when due is also mandatory. *Harris v. Marine Terminals Corp.,* 8 BRBS 712, 714 (BRB 1978).

Attorney fees

Claimant's counsel has applied for a fee, item[illegible] 28¾ hours. Respondents have objected to five of those hours. In view of the complexity of the case I find all hours claimed to be justified.

Respondents have not objected to my fixing a fee for work done before the deputy commissioner and therefore I find a fee of $2,175.00 to be reasonable for work done both before the deputy commissioner and before me. Costs in the amount of $422.36 appear reasonable and necessary.

Order

It is therefore Ordered that:

1. The respondents shall pay to the claimant compensation for pernanent total disability from December 14, 1977 to the present and continuing at the rate of two-thirds of $272.86, or $181.90 per week, and periodically adjusted in accordance with 33 U.S.C. § 910(f), with credit for amounts previously paid, if any.

2. Respondents shall pay outstanding medical bills in the amount of $387.90 to Kaiser Foundation Hospital.

3. Respondents shall pay claimant 10 percent of the

additional compensation ordered to be paid in this order as provided by 33 U.S.C. § 914(e).

4. Respondents shall pay interest on the balance of compensation ordered to be paid in this order at the rate of six percent per year, computed from the date that each such payment was originally due until the date of actual payment.

5. Respondents shall furnish such medical treatment, including psychotherapy or counseling, as the claimant may in the future require.

6. Respondents shall pay to Airola and Ringgold, claimant's counsel $2,175.00 as fees and $422.36 as costs.

By THOMAS SCHNEIDER
Thomas Schneider
Administartive Law Judge

Dated: September 25, 1979
San Francisco, California
TS:scm